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No. 00-1503

In The
Supreme Court of the United States

CITY OF GAINESVILLE, FLORIDA,

Petitioner,

v.

CANNABIS ACTION NETWORK, INC. AND KEVIN APLIN

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO PROCEEDING

The Petitioner is the City of Gainesville, Florida, a Florida municipal corporation.

Respondent Cannabis Action Network, Inc. is a Louisiana non-profit corporation with no parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the corporation.

Respondent Kevin Aplin is an individual litigant as well as a member of Cannabis Action Network, Inc.

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STATEMENT OF THE CASE[1]

There are some misstatements and omissions in the Petitioner's Statement of the Case which warrant correction and inclusion. As an initial matter, Cannabis Action Network, Inc. is not a rag-tag group engaged in civil disobedience against the nation's marijuana laws. To the contrary, the group has undertaken a mission to educate the public as to the legitimate medicinal, industrial and food uses of cannabis hemp. (App. 2). CAN, its members and associated organizations have found it necessary to resort to litigation in order to hold public rallies in public parks, when permits have been routinely denied by hostile governments. *See, e.g., Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000) (*Pet. For Cert. Pending*, 69 USLW 3530 (Feb 01, 2001) (No. 00-1249)); *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001) (*Pet. for Cert. to be filed*); *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999); *MacDonald v. Safir*, 206 F.3d 183 (2nd Cir. 2000); *Bledsoe v. City of Jacksonville Beach*, 20 F.Supp.2d 1317 (M.D. Fla. 1998); *Florida Cannabis Action Network, Inc. v. City of Jacksonville*, 130 F.Supp.2d 1358 (M.D. Fla. 2001).

This challenge to the Gainesville street closing ordinance began well before the date suggested by the City. The trial court initially required the issuance of a street closing permit as supplemental relief incident to the preliminary injunction. (App. 3) The constitutionality of the ordinance was challenged in the first Amended Complaint filed only a few months after the preliminary injunction

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1. Pursuant to Rule 24(g), Respondents submit this brief Statement of the Case, to add certain facts from the Record that they believe will better enable the Court to understand the case. With the exception of these omitted facts the City's Statement of the Case is acceptable to Respondents.

issued. This challenge was carried over in the Second Amended Complaint and was not a new cause of action.

The City does not mention that the Gainesville noise ordinance was also challenged as an unconstitutional prior restraint. Respondents could not effectively conduct a public rally without having both a street closing permit and a noise permit. (App. 3). The district court rejected Respondents' challenge against the noise permit. (App. 51-53). However, on appeal, the Eleventh Circuit reversed, finding that the noise permit was a prior restraint (App. 13-20), that failed to include any of the *Freedman* protections for free speech events. (App. 22-23).[2]

ARGUMENT

In asking this Court to review the decision of the United States Court of Appeals for the Eleventh Circuit, the City of Gainesville claims that the decision is in conflict with a decision of this Court – *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) – and with decisions of other federal circuit courts. With but a single exception, the City's claims are not properly before this Court, and review of all except that one issue is foreclosed.

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2. While the City filed a petition for rehearing and rehearing *en banc* as to the street closing ordinance, it did not do so with respect to the noise ordinance. Similarly, the City has not asked this Court to review the Eleventh Circuit ruling striking down the noise ordinance as a prior restraint. Therefore, this Petition is limited to the street closing ordinance only.

I. THIS COURT SHOULD NOT DECIDE IF THE STREET CLOSING ORDINANCE IS A PRIOR RESTRAINT.

The City asks this Court to review the Eleventh Circuit's finding that the City's street closing ordinance is a prior restraint. The City asks the Court to find that it is, instead, a time, place and manner regulation. There are two compelling reasons why this Court should not review that issue: (1) the issue was not presented to the Court of Appeals; and (2) there is no conflict with any prior decisions of this Court.

A. The question of whether the street closing ordinance is a time, place and manner regulation was not presented to the Circuit Court.

This Court is asked to consider an issue that was not properly preserved. In its Petition the City makes the following statement:

> The Eleventh Circuit panel correctly acknowledged that *Freedman*'s procedural safeguards only apply to regulatory schemes that censor the content of speech, i.e., regulations which constitute a prior restraint. (App. 20). However, from that premise, the court made a key error by treating the Gainesville ordinance as a prior restraint when the ordinance is in reality a time, place and manner restriction.

Petition, at 8.[3]

But in footnote 7 the City admits that the issue it pursues here was not raised in the Court of Appeals:

> [7] Although the parties did not argue that the street/sidewalk closing ordinance was not a prior restraint, the Petitioner was wrong not to contest that issue. (App. 13).[4]

In *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981) the petitioner attempted to raise an issue not presented to the circuit court: that the district court had abused its discretion in ruling on a motion for costs and fees. This Court said:

> Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendants costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us.
>
> 450 U.S. at 362.

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[3] The City's claim of what the Eleventh Circuit "acknowledged" is a gross distortion of the language in the opinion. Neither on page 20 of the Appendix – cited by the City – nor at any other place in its opinion did the Circuit Court make any statement like that attributed to it.

[4] The City cites to p. 13 of its Appendix, where the Court of Appeals wrote: "We need not determine if the Street Closing Ordinance is a prior restraint because both parties, as well as the district court, properly agree that it is."

In *Davis v. United States*, 495 U.S. 472 (1990), the Court refused to consider a question not properly preserved for review:

> Petitioners also assert that because their sons are agents of the Church authorized to receive payments to support their own missionary efforts, payments made to their sons are payments to the Church. Because this argument was neither raised before nor decided by the Court of Appeals, we decline to address it here. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362; *United States v. Mendenhall*, 446 U.S. 544, 551, 552, n. 5 (1980).

495 U.S. at 488-89.

And in *Breininger v. Sheet Metal Workers International Association Local Union No. 6*, 493 U.S. 67 (1989), the Court rejected an attempt to raise a claim not presented below:

> We do not pass on petitioner's claim that certain of his rights secured by the LMRDA were "infringed" by respondent's conduct, in violation of §102, 29 U.S.C. §412 (1982 ed.), because the claim was neither presented to nor decided by the Court of Appeals below, and thus is not properly before us.

493 U.S. at 94, fn. 18.

This Court should not now review what the Eleventh Circuit was not asked to decide.[5]

B. The Eleventh Circuit's determination that the street closing ordinance is a prior restraint is not in conflict with *FW/PBS*.

Even if the issue of whether the ordinance was a prior restraint had been raised in the Circuit Court, the Eleventh Circuit's ruling is not in conflict with any decision of this Court. At page 12 of its Petition, the City makes the incorrect claim that:

> . . . the business licensing scheme under scrutiny in *FW/PBS* [*Inc. v. City of Dallas*, 493 U.S. 215 (1990)] was aimed at the content of expressive activity, i.e., sexually explicit speech of the businesses regulated by the licensing ordinance . . . .

To the contrary, the licensing scheme in *FW/PBS* was as content-neutral as it could be; it did not make any provision for the chief of police to pass on the content of the material sold or exhibited when processing a license application.[6] While the Dallas licensing ordinance only

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[5] Respondents readily acknowledge that *if* the issue had been argued in the Eleventh Circuit, and *if* that Court had found the Street Closing Ordinance to be a prior restraint, the decision would be in direct and irreconcilable conflict with the Seventh Circuit's opinion in *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000)(petition for writ of certiorari pending, Docket No. 00-1249).

[6] The Dallas ordinance is reproduced in its entirety in *Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D. Tex. 1986), the case that eventually reached this Court as *FW/PBS*.

applied to sexually oriented businesses, that does not mean that it was content-based. For, as this Court explained in *Renton v. Playtime, Theatres, Inc.*, 475 U.S. 41 (1986), the fact that an ordinance only regulates a certain class of businesses based on the content of the entertainment presented does not make the ordinance content-based.

This Court found the Dallas ordinance to be a prior restraint, after the Fifth Circuit had held that it was a time, place and manner regulation.[7] Both the Eleventh Circuit and the district court found the Gainesville street closing ordinance to be a prior restraint. There is no conflict with *FW/PBS*.

The City argues that *Freedman* does not apply to licensing ordinances, but is limited to ordinances that authorize the government to pass directly on the content of the material. That position ignores the statement in the plurality opinion in *FW/PBS* that:

> Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license.
>
> 493 U.S. at 226.

It does not seem to matter whether the ordinance directly authorizes censorship or silently permits it by avoiding *Freedman*'s constitutional protections. Either way

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[7] *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988).

speech is the victim of suppression and core political speech is not spared.

II. RESPONDENTS AGREE THAT A CONFLICT EXISTS BETWEEN THE FEDERAL CIRCUITS THAT SHOULD BE RESOLVED BY THIS COURT.

The City correctly states that a direct conflict exists between the Seventh and Eleventh Circuits on whether a city must bear the burden of seeking judicial review when it denies a permit for a political rally in a public park. In this case the Eleventh Circuit said:

> In the case before us, the censored party lacks the business incentive to pursue review through the courts, and the speech at issue is core political speech in a public forum. Thus, once again, "[w]e believe this is a situation for 'treating unlike things differently according to their differences.' " *Boss Capital*, 187 F.3d at 1256 (quoting *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir. 1999)). The right to speak sought by CAN in this instance deserves greater protection than that outlined by the plurality in *FW/PBS*. Accordingly, we decline to relieve the City of the requirement that its Street Closing Ordinance meet *Freedman*'s first procedural safeguard [requiring government to initiate judicial review and bear the burden of proof in court].
>
> (App. 31).

In *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000) the Seventh Circuit was confronted with the identical issue. The Chicago Park District's ordinance made no mention of judicial review, leaving the burden of seeking review on the unsuccessful applicant. The Court wrote:

> The plaintiffs argue that the park district should in every case in which it denies a permit be required to seek judicial review of its own action. The argument is based on a misreading of *Freedman v. Maryland*, *supra*, 380 U.S. at 58-59, 85 S.Ct. 734, which holds only that the government may not regulate the content of speech without judicial authorization and so does not extend to time, place, and manner licensing systems. The Supreme Court made that clear in *FW/PBS, Inc. v. City of Dallas* (citation omitted).
>
> 227 F.3d. at 926.

And in *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001), the Seventh Circuit analyzed an ordinance requiring a permit for a parade on any city street or sidewalk. In that case the Court said:

> This court has likewise concluded, based on the rationale of *FW/PBS*, that a content-neutral licensing or permit statute need not include a provision requiring the government to bear the burden of going to court to deny a permit. *Thomas*, 227 F.3d at 926-27. *See also*, *Graff*, 9 F.3d at 1324 n. 11; id. at 1330 (Flaum, J. concurring)

> ("Further, after *FW/PBS*, it seems likely that *Freedman*'s third requirement--that the licensor bear all court-related burdens--does not apply in this case."). *Accord*, *Beal v. Stern*, 184 F.3d 117, 128 (2d Cir. 1999) (because park permit ordinance was content-neutral prior restraint, it "need comply with only the first two *Freedman* factors."). Therefore, based on *FW/PBS*, *Thomas* and *Graff*, we conclude that Chicago ordinance Section 10-8-330 need not satisfy the third *Freedman* standard.
>
> 243 F.3d at 1036.

Clearly, then, there is a direct conflict on this issue of critical constitutional importance. Respondents agree with the City of Gainesville that the conflict should be resolved by this Court.

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW TWO OTHER ISSUES THAT WERE NOT ADDRESSED BY THE CIRCUIT COURT.

Respondents have already argued that the Court should not decide whether the street closing ordinance is a prior restraint or a time, place and manner, because the issue was never presented to the Eleventh Circuit. A similar rationale applies to two other questions the City presents.

A. Certiorari is not appropriate to decide whether prompt judicial review contemplates a timely disposition on the merits.

The City quite correctly notes that there is a significant split among the federal circuits over the issue of judicial review of licensing determinations affecting free speech interests. The circuits are hopelessly divided between those which hold that mere access to the courts is sufficient and those which require prompt judicial disposition before a restraint may be imposed.[8]

The City is also correct when it states that the issue is one of national significance because it involves the most fundamental of rights. However, certiorari would be improper in this case because the issue of prompt judicial review was simply not decided by the Eleventh Circuit below.

The Eleventh Circuit found the street closing ordinance to be unconstitutional because it did not require the City to bear the burden of initiating judicial review following the denial of a permit. (App. 30-32). But the Court did not reach the issue of judicial review the City asks this Court to decide. Indeed, the Court said it was not ruling on the question:

> Importantly, we limited ourselves in *Boss Capital* to the specific facts before us and declined to answer the unposed question of whether *Freedman*'s requirement of "prompt

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[8] The City's recitation of the conflicting Circuit Court opinions in footnotes 11 and 12 of its Petition is essentially accurate. (Pet. 25, fn 11, 12).

> judicial review" demanded explicit provision for prompt judicial determination in challenges not involving business licensing schemes. *See id.* at 1256-57. ***For the reasons explained below, we need not answer that difficult question today.***
>
> App. at 26 (emphasis added).

The District Court also avoided ruling on this precise issue, deciding instead that prompt judicial review was not required at all for licensing schemes:

> *FW/PBS* held that mere licensing schemes are not presumptively invalid. When a denial under a scheme that is not presumptively invalid is involved, the societal interests in reviewing a presumptively wrong decision is not present. Thus, because the denial under such a scheme is not presumed to be invalid, the scheme need not contain a requirement that a final judicial determination will be made within any fixed period of time. In other words, without the presumption that the denial was invalid, it is more permissible for the applicant to bear the risks of delays before a final judicial determination.
>
> App. at 50.

This Court has stated that it will not grant a request for certiorari where the purported issues are not fully and squarely addressed by the lower Courts. *See, e.g., Matsushita Electrical Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 379, fn 5 (1996) ("[W]e generally do not address

arguments that were not the basis for the decision below..."); *National Collegiate Athletic Association v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below"). *Compare*, *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Petitioners raise this question in their brief . . . but it was addressed by neither the District Court nor the Court of Appeals . . . Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

In this case, the issue of the meaning of prompt judicial review was not simply overlooked – it was specifically avoided by the Eleventh Circuit. While the issue of prompt judicial review is fascinating and compelling – and is the first question presented in the petition in *Thomas v. Chicago Park District*, Docket No. 00-1249 – it is not presented by this case and cannot serve as a reason for granting certiorari.

B. Likewise, the Court should not review the issue of whether a licensing scheme must specifically provide for judicial review.

The Circuits are also divided over a sub-issue of the judicial review question: whether licensing ordinances affecting free speech must specifically provide for judicial review in the ordinance itself. While this sub-issue is also of surpassing importance to the protection of free speech, the Eleventh Circuit did not address the question in its opinion. As noted above, with respect to judicial review generally, the Eleventh Circuit decided this case on alternate grounds – namely the burden of initiating litigation. (App. 30-32).

The only mention of this issue in the Eleventh

Circuit opinion occurs in a footnote to the general discussion on judicial review. (App. 25, fn 18). There, the Eleventh Circuit merely notes that some of the Circuits disagree over whether an ordinance must specify a means of judicial review. The Court mentions that some of the Circuits have distinguished the case of *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) on its facts. However, the Eleventh Circuit did not apply or construe *Southeastern Promotions* and, instead, ruled on other grounds.

The closest the City of Gainesville can come to stating an issue for certiorari is to suggest that "reading between the lines, it appears that the court has staked out a position . . . ." Pet. at 28). However, one does not need to read between the lines to conclude that the Eleventh Circuit did "*not answer that difficult question.*" (App. 26). The jurisprudential rules governing certiorari suggest that this Court should not answer that difficult question either because the issue was not decided below. *Matsushita Electrical, supra; National Collegiate Athletic Association, supra.*

CONCLUSION

Respondents find themselves in the unusual position of asking this Court to review a case in which Respondents overwhelmingly prevailed below. Were this Court to deny the City's Petition, the Eleventh Circuit opinion would be the law in the states of Florida, Georgia and Alabama.

But Respondents are not isolated and alone in their efforts. They believe it is critical to their efforts that they, their members and affiliated organizations be allowed to hold rallies in public parks across the nation. Without a national movement, their cause is hopeless. The citizens of

Chicago and New York and every other city in the country deserve to hear and consider Respondents' message and judge its validity for themselves. They should not be denied access to that message because of the hostility of local governments opposed to any change in the laws.

Thus, Respondents are willing to sacrifice their victory in this case, in order that this Court might review and resolve the conflict among the circuits on the single issue truly presented by this case. Respondents ask the Court to grant the Petition for Writ of Certiorari, limited to Question II: whether the government is required to initiate judicial review, and bear the burden of proof, when it denies its citizens the right to engage in political speech in the quintessential public forum.

Respectfully submitted,

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